

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MERVEIT ASSAD DENHA,

Plaintiff,

Case No. 2005-3706-NI

vs.

JARED DON PAXTON, DONALD
PAXTON, PAULA LAWNENCIA
MONETTE-CARTER,

Defendants.

OPINION AND ORDER

Defendant Paxtons ("Defendants") moved for summary disposition under MCR 2.116(C)(10).

This cause of action is the result of a motor vehicle accident that occurred on May 20, 2005. According to Plaintiff's complaint, Defendant Jared Paxton failed to stop at a red light, whereupon it struck a vehicle being driven by defendant Monette-Carter, whose vehicle then collided with Plaintiff's vehicle. Plaintiff alleges she suffered severe injuries as a result, and on September 16, 2005, filed this complaint seeking recourse for Defendants' alleged negligence in the operation of their vehicles. Donald Paxton is a named defendant party under MCL 257.401 *et seq.*, as the owner of the vehicle driven by Defendant Jared Paxton. A notice of entry of default against Defendant Monette-Carter was entered on December 28, 2005, for failure to plead or otherwise defend. Defendants now request dismissal on the basis that Plaintiff cannot satisfy the threshold requirements to sustain a claim under MCL 500.3135 *et seq.*



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Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The record is considered in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists that precludes granting judgment as a matter of law to the moving party. *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005). Once the moving party has met the initial burden by supporting its position with documentary evidence, the burden shifts to the nonmoving party to establish the existence of a genuine issue of fact. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A genuine issue of fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Applicable Law

Under MCL 500.3135(1), a person is subject to tort liability for noneconomic loss caused by his or her "use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). As used in this section, "serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7); *Id.*

The Michigan Supreme Court has provided a framework to use for determining whether a plaintiff meets the serious impairment threshold. *Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004). First, a court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is

not material to the determination whether the person has suffered a serious impairment of body function.” *Id* at 131-132.

If there are material factual disputes, a court may not decide the issue as a matter of law. *Moore, supra* at 518. If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, whether plaintiff’s injuries constitute a serious impairment of body function is a matter of law. MCL 500.3135(2)(a); *Kreiner, supra* at 132.

When a court decides that the issue is a matter of law, it must then go to the second step in the analysis and determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Kreiner, supra*. When a court finds an objectively manifested impairment of an important body function, “it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id*. This involves an examination of the plaintiff’s life before and after the accident. *Moore, supra* at 518. The court should objectively determine whether any change in his or her lifestyle “has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.” *Kreiner, supra* at 132-133. “Merely ‘any effect’ on the plaintiff’s life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id* at 133, emphasis in original.

The term ‘general’ can require a focus on multiple aspects of a person’s life to determine the effect of an impairment on the person’s lifestyle. *Id*. It is proper to compare a person’s lifestyle before and after an accident to determine if a factual dispute exists regarding a person’s general ability to lead his or her normal life. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000).

The *Kreiner* Court provided a non-exhaustive list of objective factors that may be used in making this determination. These factors include “(a) the nature and extent of the impairment,

(b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery.” *Id* at 133.

With regard to residual impairments, the *Kreiner* Court noted, “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id* at 133 n 17. A more recent case, *McDaniel v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005), commented on the *Kreiner* footnote, stating, “Read in the context of the placement of the footnote, the footnote can be construed as providing, ‘self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment].’ The necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.” *McDaniel, supra* at 282-283.

While arguably judicial dicta, the *McDaniel* Court further stated, “We think it evident that our Supreme Court crafted footnote 17, *in the context of establishing the extent of any residual impairment*, [emphasis in original] because the nature of pain tends to be subjective and therefore inherently questionable. *Id* at 284. Even dicta of judicial superiors of Court of Appeals is entitled to considerable deference. *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884 (1984). While there may exist a medically identifiable or physiological basis for the pain, self-imposed restrictions due to pain, in and of themselves, fail because there is no medical expertise supporting the restrictions, which expertise would in all likelihood take into consideration the source of the pain before restrictions are imposed. *McDaniel, supra* at 284. That said, if there are physician-imposed restrictions based on real or perceived pain, footnote 17 does not require that the doctor offer a medically identifiable or physiological basis for imposing the restrictions. *Id.*

In order to be objectively manifested, there must be a medically identifiable injury that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652; 654 NW2d 604 (2002). Subjective complaints of injury can support a claim of serious impairment of body function, but only if there is a physical basis and an expert diagnosis to support the subjective claim. *Id* at 650.

Evidentiary Documentation

Plaintiff was seen at William Beaumont Hospital on May 20, 2005, following the automobile collision. After examination, the final impression/diagnosis was, "Status post motor vehicle accident with muscular strain and lumbar strain." The report stated that Plaintiff described the accident, and stated although she was seat-belted, she lurched forward and struck her chest on the steering wheel. The air bag did not deploy. The report further stated Plaintiff had slight discomfort on her chest. "No other complaints." Further, the report stated, "She denies any headache, double vision, blurry vision, tinnitus, decreased hearing, difficulty speaking or swallowing. Had no loss of consciousness." Plaintiff stated she had slight tightness in the back of her neck and in her low back area. Plaintiff underwent certain diagnostic testing with the results as stated: "Chest PA and Lateral Impression: Normal chest ... unspecified chest pain." "Cervical Spine Complete Impression: Negative cervical spine ... C1-c4 level spinal cord injury, unspecified."

Plaintiff testified that between the date of her accident and June 16, 2005, she treated with no physician for the pain she claims she experienced. Plaintiff found a chiropractor, Daniel Gruber, through the yellow pages, and was seen on June 16, 2005. The report indicates that Plaintiff complained of lower back pain and tingle in the arms and legs and neck pain. The report also indicates that x-rays were obtained on June 16, 2005, but the findings were not

indicated. Plaintiff continued to visit this chiropractor at what appears to be every two or three days from June 16, 2005 through December 20, 2005. There is nothing to indicate what was causing her neck pain and other soreness. Plaintiff testified that Dr. Gruber performed no diagnostic testing on her other than the initial x-rays when she first started treating with him. Plaintiff testified that Dr. Gruber did not recommend that she consult with any other specialist.

At a point in time, although she cannot recall how she obtained the name and number¹, she consulted with a neurologist, Paul A. Cullis, M.D. on August 29, 2005. In the report generated following that visit, it states that Plaintiff told Dr. Cullis that she had hit her head on the steering wheel of her car during the accident, and "the next thing she remembers after the accident is awakening with her car against a third vehicle." The report also indicates that Plaintiff complained of frequent, daily, and severe headaches, with nausea, which were not present prior to the accident. Further, Plaintiff complained of difficulty with short term memory since the accident.

Upon examination, Dr. Cullis noted Plaintiff was in no acute distress, she was alert and cooperative, and although recent memory was somewhat reduced, remote memory was good. The physician's overall impression was: (1) right C4/5 radiculopathy, (2) low back pain, (3) closed head injury, (4) adjustment reaction with depressed mood.

The report states in relevant part, "This patient appears to have a closed head injury. She had a period of loss of consciousness. She has headaches, light headedness, and difficulty with memory since the accident. The headaches are quite severe. She appears to have an adjustment reaction with depressed mood. She needs a complete battery of neuropsychological testing." Although Dr. Cullis recommended an MRI, Plaintiff did not follow through.

¹ The IME report indicates Plaintiff reported finding Dr. Cullis' name in the yellow pages, as well.

On January 30, 2006, Plaintiff was examined for an independent medical evaluation. Following an examination, Dr. Taylor concluded that he was unable to find an objective basis for Plaintiff's ongoing complaints related to the auto accident. He also stated, "In terms of her headaches, there does appear to be some discrepancies in the history provided to Dr. Cullis from that which was provided in the Emergency Room. In light of this, I would recommend if these are ongoing allegations that the patient be evaluated by a specialist in this area."

Discussion

Included in the parties' briefs are no medical reports that indicate that Plaintiff suffered a medically identifiable injury that has a physical basis, with the exception of the initial hospital diagnosis that Plaintiff suffered a "strain." *Jackson, supra*. No additional diagnostic studies are in evidence that indicate any abnormalities in her sternum or cervical spine.

Additionally, Plaintiff claims she suffered from a closed head injury. MCL 500.3135(2)(a)(ii) provides that for a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries testifies under oath that there may be a serious neurological injury. In *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000), the Court stated that to give effect to the phrase "serious neurological injury," it must be concluded that the closed head injury provision of § 3135 requires more than a diagnosis that a plaintiff has sustained a closed head injury. *Id* at 229. The Court went on to explain that the plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was severe. *Id* at 230. The Court stated that § 3135 requires that the affidavit must contain testimony that a plaintiff may have sustained a *serious* neurological injury. *Id* at 231 (emphasis in original). Here, there is no such affidavit, rather, based on self-reports of symptomology, a doctor Plaintiff selected from

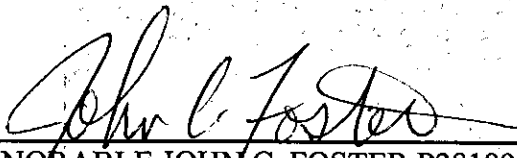
the yellow pages opined "This patient appears to have had a closed head injury." Plaintiff apparently told this physician she had lost consciousness, whereas all other reports indicate she never lost consciousness, and it was her chest which came into contact with the steering wheel, not her head. Without the requisite supporting affidavit of a licensed allopathic or osteopathic physician, there is no material factual dispute to the determination of whether Plaintiff has suffered a serious impairment of body function as it pertains to the possibility that she suffered a closed head injury.

Plaintiff complains of pain that is severe enough to significantly change her lifestyle, however, it is injuries, not the associated pain, that must be medically substantiated through objective manifestation. *Guerrero v Schoolmeester*, 135 Mich App 742, 748; 356 NW2d 251 (1984). The Court is unconvinced that Plaintiff has succeeded in this task, as the medical records fail to link Plaintiff's lingering pain and symptoms to the alleged sustained injury, the initial "strain." With respect to Dr. Gruber's recommended limitations of no bending, lifting, twisting, prolonged standing, and so forth, it must be remembered that even if there are physician-imposed restrictions based on real or perceived pain, it does not require that the doctor offer a medically identifiable or physiological basis for imposing the restrictions. See *Kreiner, supra*, and *McDaniel*. In other words, if a patient self-reports pain when attempting certain activities, the physician, in an attempt to alleviate the pain and symptoms would in all likelihood recommend that a patient not engage in activities that would bring about pain, even in the absence of a medically identifiable source for imposing the restrictions.

Accordingly, the Court is unconvinced that Plaintiff has met her burden to meet the threshold requirement under MCL 500.3135; therefore, as a matter of law, there is no basis on which this Court should deny Defendants' request for dismissal.

For the above-stated reasons, Defendants Jared and Donald Paxton's motion for summary disposition pursuant to MCR 2.116(C)(10) is GRANTED, and Plaintiff's claims are dismissed. In conformance with MCR 2.602(A)(3), the Court states that this Opinion and Order resolves the last pending matter and CLOSES THE CASE.

IT IS SO ORDERED.



HONORABLE JOHN C. FOSTER P28189
Circuit Judge

Dated: May 25, 2006

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